



1 ("Mot. to Strike"). Plaintiff filed an Opposition to both motions  
2 and Movants filed a Reply. ECF Nos. 42 ("Opp'n"), 43 ("Reply").  
3 For the following reasons, the Court GRANTS Movants' Motion to  
4 Dismiss, dismissing all claims against Movants WITH PREJUDICE, and  
5 DENIES Movants' Motion to Strike as moot.

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7 **II. BACKGROUND**

8 The following allegations are taken from Plaintiff's FAC.  
9 Plaintiff is a resident of San Bruno, California. FAC ¶ 1. Around  
10 February 9, 2005, Plaintiff entered into two loan repayment and  
11 security agreements with defendant Wilmington Finance  
12 ("Wilmington"). Id. ¶ 3. MERS is the "current mortgage  
13 nominee/beneficiary" of the loan. Id. ¶ 10. Plaintiff does not  
14 allege any facts concerning Vericrest other than that it was  
15 "another mortgage lender." Id. ¶ 11.

16 Under the loan, Plaintiff borrowed \$584,000 to refinance his  
17 personal residence in San Bruno. Id. ¶¶ 3, 4. The terms of the  
18 loan included an initial two-year fixed interest rate of 6.5  
19 percent followed by an adjustable rate based on the six-month LIBOR  
20 index plus 6.25 percent. Id. ¶ 4. Plaintiff states that the loan  
21 will eventually adjust to 12.5 percent, bringing Plaintiff's  
22 monthly payment from \$3,691.28 to \$6,232.79, which he characterizes  
23 as "extreme payment shock." Id. ¶ 4. In addition, the loan has a  
24 two-year prepayment penalty requiring Plaintiff to pay six months  
25 advance interest if he makes a full prepayment or partial  
26 prepayment of more than 20 percent of the original principal amount  
27 in any twelve-month period. Id. ¶ 29.

28 Plaintiff alleges that Defendants designed the loan such that

1 negative amortization would occur, making foreclosure inevitable.  
2 Id. ¶ 15. Plaintiff alleges that the loan was underwritten without  
3 proper due diligence because Wilmington failed to adequately verify  
4 Plaintiff's income. Id. ¶ 32.

5 Plaintiff alleges that a forensic audit of Plaintiff's loan  
6 documents revealed legal violations in the handling and processing  
7 of Plaintiff's loan, giving rise to a number of his causes of  
8 action. Id. ¶ 37. While Plaintiff does not claim to be unable to  
9 speak English, he does state that English is not his primary  
10 language and that he "does not have comprehensive English reading  
11 or writing skills" or "an adequate command of the English  
12 language." Id. ¶ 31. Plaintiff alleges that he was unable to  
13 understand many of the provisions and terms of the loan agreement  
14 because documentation was not provided to him in his native  
15 language. Id. ¶¶ 31, 117.

16 Plaintiff brings eighteen causes of action against the Movants  
17 and other Defendants: (1) declaratory relief; (2) injunctive  
18 relief; (3) failure to perfect interest in the deed of trust under  
19 California Commercial Code § 9313 ("failure to perfect"); (4)  
20 breach of California's covenant of good faith and fair dealing  
21 ("bad faith"); (5) violation of the Truth in Lending Act, 15 U.S.C.  
22 § 1601 ("TILA"); (6) violation of the Real Estate Settlement  
23 Procedures Act, 12 U.S.C. §§ 2601-17 ("RESPA"); (7) violation of  
24 California Civil Code §§ 1918-1921; (8) violation of California  
25 Civil Code § 1916.7(b)(2); (9) violation of California Civil Code §  
26 1916.7(a)(4)(B); (10) violation of California Civil Code § 2932.5;  
27 (11) violation of California Civil Code § 1632; (12) rescission;  
28 (13) fraud; (14) unfair and deceptive acts and practices ("UDAP");

(15) breach of fiduciary duty; (16) unconscionability; (17) predatory lending under California Business and Professions Code § 17200 ("UCL"); and (18) quiet title. Id. at ¶¶ 47-157.

Defendant AIG, formerly known as Wilmington Finance, previously brought a Motion to Dismiss the FAC. ECF No. 22. On June 6, 2011, the Court granted AIG's motion, dismissing all claims against AIG with prejudice. ECF No. 34 ("June 6, 2011 Order").

### III. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a complaint must be both "sufficiently detailed to give fair notice to the opposing party of the nature of the claim so that the party may effectively defend against it" and "sufficiently plausible" such that "it is not unfair to require the opposing

party to be subjected to the expense of discovery." Starr v. Baca, 633 F.3d 1191, 1204 (9th Cir. 2011).

#### IV. DISCUSSION

Plaintiff concedes that his first, second, third, seventh, eighth, ninth, tenth, eleventh, twelfth, sixteenth, and eighteenth causes of action should be dismissed. Opp'n at 3. This leaves two federal causes of action -- TILA and RESPA -- and five state law causes of action -- breach of good faith and fair dealing, fraud, UDAP, breach of fiduciary duty, and predatory lending. Movants argue that all of these claims are time-barred by the applicable statutes of limitation, as they accrued upon consummation of the loan agreement more than six years ago.<sup>1</sup> Mot. to Dismiss at 9-13. Plaintiff does not dispute the fact that these claims are time-barred, but asks the Court to apply the doctrine of equitable tolling to these claims. Opp'n at 4. Citing to the Court's June 6, 2011 Order, Movants counter that equitable tolling is inappropriate. Mot. to Dismiss at 9-13. For the reasons set forth in the Court's prior order and the reasons set forth below, Plaintiff's remaining claims are time-barred and therefore fail as

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<sup>1</sup> The statute of limitations for TILA damages claims is one year. 15 U.S.C. § 1640(e). The statute of limitations for RESPA is one year "from the date of the occurrence of the violation." 12 U.S.C. § 2614. The statute of limitations for non-insurance bad faith claims is four years. Cal. Civ. Proc. Code § 337(1). The statute of limitations for fraud is three years from the time the plaintiff either discovers the facts giving rise to the fraud or could have discovered such facts with reasonable diligence. April Enters., Inc. v. KTTV, 147 Cal. App. 3d 805, 827-28 (Ct. App. 1983). The statute of limitations for claims brought under California's Unfair Competition Law ("UCL") is four years. Cal. Bus. & Prof. Code § 17208. The statute of limitations for breach of fiduciary duty is four years from the breach or the time where the plaintiff could have discovered the facts concealed through reasonable diligence. Cal. Civ. Proc. Code § 343.

1 a matter of law. See June 6, 2011 Order at 6-9.

2 "Generally, the applicability of equitable tolling depends on  
3 matters outside the pleadings, so it is rarely appropriate to grant  
4 a Rule 12(b)(6) motion to dismiss (where review is limited to the  
5 complaint) if equitable tolling is at issue." Huynh v. Chase  
6 Manhattan Bank, 465 F.3d 992, 1003-04 (9th Cir. 2006). However, a  
7 motion to dismiss based on the statute of limitations may be  
8 granted "if the assertions of the complaint, read with the required  
9 liberality, would not permit the plaintiff to prove that the  
10 statute was tolled." Vernon v. Heckler, 811 F.2d 1274, 1278 (9th  
11 Cir. 1987) (citation and quotations omitted). "Equitable tolling  
12 may be applied if, despite all due diligence, a plaintiff is unable  
13 to obtain vital information bearing on the existence of his claim."  
14 Santa Maria v. Pacific Bell, 202 F.3d 1170, 1178 (9th Cir. 2000)  
15 (overruled on other grounds by Socop-Gonzalez v. Immigration and  
16 Naturalization Serv., 272 F.3d 1176, 1194 (9th Cir. 2000)).

17 Regarding Plaintiff's TILA claim, the Supreme Court has held  
18 that TILA's rescission remedy is completely extinguished at the end  
19 of the three-year limitations period and is not subject to  
20 equitable tolling. Beach v. Ocwen Fed. Bank, 523 U.S. 410, 413  
21 (1998). Therefore, to the extent Plaintiff seeks rescission under  
22 TILA, his claim is barred. A TILA claim for damages under 15  
23 U.S.C. § 1640(e), however, may be subject to equitable tolling,  
24 suspending the limitations period "until the borrower discovers or  
25 had reasonable opportunity to discover the fraud or nondisclosures  
26 that form the basis of the TILA action." King v. California, 784  
27 F.2d. 910, 915 (9th Cir. 1986). Plaintiff contends that equitable  
28 tolling is appropriate because loan documents were not provided to

1 Plaintiff in his native language. Opp'n at 6. The Court rejected  
2 this same argument in its prior order. June 6, 2011 Order at 6-7.  
3 Moreover, equitable tolling is inappropriate where, as here,  
4 "nothing prevented the plaintiff from comparing the disclosures  
5 made with the disclosures required under TILA." Glaser v.  
6 Advantage Fin., 2011 U.S. Dist. LEXIS 52692, at \*13-14 (N.D. Cal.  
7 May 5, 2011); see also Romero v. Mortgage Co., 2011 U.S. Dist.  
8 LEXIS 69673, at \*9 (N.D. Cal. June 28, 2011). Accordingly,  
9 Plaintiff's TILA claim fails as a matter of law.

10 With respect to Plaintiff's RESPA claim, Plaintiff argues that  
11 equitable tolling is consistent with RESPA's purpose of ensuring  
12 disclosure of settlement costs and eliminating kickbacks and  
13 referral fees. Opp'n at 6-7. The Court addressed this same  
14 argument in its June 6, 2011 Order and found that equitable tolling  
15 was not appropriate. June 6, 2011 Order at 8. Accordingly,  
16 Plaintiff's RESPA claim fails as a matter of law.

17 As for Plaintiff's remaining state law causes of action,  
18 equitable tolling "halts the running of the limitations period so  
19 long as the plaintiff uses reasonable care and diligence in  
20 attempting to learn the facts that would disclose the defendant's  
21 fraud or other misconduct." Sagehorn v. Engle, 141 Cal. App. 4th  
22 452, 460 (Ct. App. 2006) (citation and quotations omitted). "To  
23 establish that equitable tolling applies, a plaintiff must prove  
24 the following elements: fraudulent conduct by the defendant  
25 resulting in concealment of the operative facts, failure of the  
26 plaintiff to discover the operative facts that are the basis of its  
27 cause of action within the limitations period, and due diligence by  
28 the plaintiff until discovery of those facts." Id. at 460-61

(citation and quotations omitted).

Plaintiff's only allegation of fraudulent conduct resulting in concealment is that loan documents were provided to him in English, for which he does not have "comprehensive . . . reading or writing skills." See FAC ¶¶ 31-32; Opp'n at 6-7. As the Court held in its prior order, this argument fails as a matter of law. June 6, 2011 Order at 8-9. Further, Plaintiff "failed to exercise due diligence by seeking help from a person capable of understanding the loan documents before he signed them." Id. at 9. Accordingly, Plaintiff's remaining state law causes of action fail as a matter of law.

The Court thus finds that even when the FAC is read liberally and the facts pleaded are assumed to be true, Plaintiff cannot, as a matter of law, prove equitable tolling of the respective statute of limitations. Therefore, the Court DISMISSES, WITH PREJUDICE, the remaining causes of action brought against Movants.

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1 **V. CONCLUSION**

2 For the foregoing reasons, the Court GRANTS Movants' Motion to  
3 Dismiss and DISMISSES, WITH PREJUDICE, all causes of action brought  
4 against Defendants Mortgage Electronic Registration Systems, Inc.  
5 and Vericrest Financial, Inc. in Plaintiff Catarino Mendoza's First  
6 Amended Complaint. Further, the Court DENIES Defendants Mortgage  
7 Electronic Registration Systems, Inc. and Vericrest Financial,  
8 Inc.'s Motion to Strike as moot.

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10 IT IS SO ORDERED.

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12 Dated: September 21, 2011

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14 UNITED STATES DISTRICT JUDGE  
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